IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1232~~ 70-75

MOOSE LODGE No. 107, *Appellant*,

v.

K. LEROY IRVIS, and WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member, and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD, COMMONWEALTH OF PENNSYLVANIA

**Appeal from the United States District Court for the Middle District of Pennsylvania**

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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MOOSE LODGE NO. 107, appellant herein, prays that an order be entered noting probable jurisdiction of its appeal from the final decree of the United States District Court for the Middle District of Pennsylvania, three judges sitting, entered in this cause on November 13, 1970.

## OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A11) is reported at 318 F. Supp. 1246.

## JURISDICTION

(i) This was an action under 42 U.S.C. § 1983 seeking injunctive and declaratory relief on the ground that the Pennsylvania Liquor Code (bound separately in Appendix F), as applied, denied the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment.

(ii) The final decree of the court below (Appendix B, *infra*, pp. A12-A13) was entered on November 13, 1970. A motion to modify that decree, filed on December 2, 1970, was denied on January 5, 1971 (Appendix C, *infra*, p. A14). A motion to stay the final decree pending the present appeal was granted on January 8, 1971. The notice of appeal (Appendix D, *infra*, p. A15) was filed in the court below on January 4, 1971.

(iii) The jurisdiction of this Court to review the judgment below by appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

(iv) The case relied on to sustain the jurisdiction of the three-judge court and hence to establish that the remedy is by appeal is *Flast* v. *Cohen*, 392 U.S. 83, 88-91.

The authorities relied on to sustain the substantiality of the questions presented by this appeal are *Bell* v. *Maryland*, 378 U.S. 226, 313; *Evans* v. *Newton*, 382 U.S. 296, 298; and Section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(e); Appendix E, *infra*, p. A16).

(v) The State statutes and regulations which, in their application to the plaintiff below in the circum-

stances of this case, were asserted to violate the Equal Protection Clause of the Fourteenth Amendment (Appendix E, *infra*, p. A16), are the Pennsylvania Liquor Code and the regulations thereunder, all of which are set out in full in Appendix F, which is separately bound.

## QUESTIONS PRESENTED

1. Whether the issuance of a liquor license to a private club so far constitutes state action as to render enforcement by that club of its restrictive membership provisions a violation of the Equal Protection Clause.

2. Whether, as held by the court below, a private club is free to impose religiously restrictive membership provisions notwithstanding its possession of a state liquor license, although prohibited by the Equal Protection Clause from imposing racially restrictive membership provisions under identical circumstances.

3. Whether the statutory exemption for private clubs in § 201(e) of the Civil Rights Act of 1964 so far gives effect to the constitutionally protected liberties of privacy and private association that this Congressionally directed exemption should be respected as marking the constitutional boundaries of an area wholly free from governmental supervision or interference.

4. Whether, assuming solely for purposes of argument that possession of a state liquor license by a private club constitutes state action subject to constitutional restrictions, the proper remedy for giving effect both to the visiting individual's right to equal protection of the laws as well as to the members' rights to privacy and private association would have been an injunction against the state requiring the private club to enforce its own restrictive membership regulations,

rather than what the court below actually decreed, namely, the termination of the private club's state liquor license until it altered its membership qualifications.

## STATEMENT

This was an action under 42 U.S.C. § 1983 seeking injunctive and declaratory relief on the ground that Pennsylvania's statutory scheme for the regulation of the liquor traffic, under which a liquor license was issued to a private club that had restrictive membership provisions, denied the plaintiff the equal protection of the laws when he was refused service because of his race. Relief was granted on the view that possession of the liquor license transformed into state action what was done by the private club, although the court below went on to hold that religiously restrictive membership provisions would have involved no similar constitutional deprivation.

### A. Background of the Controversy

Since the facts in this case were stipulated, we deem it appropriate to adopt the recital appearing in the opinion below (Appendix A, *infra*, pp. A1-A4):

"Defendant Moose Lodge No. 107 is a non-profit corporation organized under the laws of Pennsylvania. It is a subordinate lodge chartered by the Supreme Lodge of the World, Loyal Order of Moose, a non-profit corporation organized under the laws of Indiana, which we permitted to intervene and argue as amicus curiae. The local Lodge conducts all its activities in Harrisburg in a building which it owns. It has never been the recipient of public funds. It is the holder of a club liquor license issued by the defendant Liquor Control Board of the Commonwealth of Pennsylvania, pursu-

ant to the provisions of the Pennsylvania Liquor Code, Act of April 12, 1951, P.L. 90, as amended.[1]

"Under its charter from the Supreme Lodge the local Lodge is bound by the constitution and general by-laws of the Supreme Lodge.[2] The Constitution of the Supreme Lodge provides:

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"[1] 47 Purdon's Pa. Stat. Annot. §§ 1-101 et seq."

[All footnotes are in the original unless otherwise indicated by square brackets; the Pennsylvania Liquor Code is separately bound in Appendix F.]

"'The objects and purposes of the local Lodge are set forth in the Constitution of the Supreme Lodge as follows:

"'The objects and purposes of said fraternal and charitable lodges, chapters, and other units are to unite in the bonds of fraternity, benevolence, and charity all acceptable white persons of good character; to educate and improve their members and the families of their members, socially, morally, and intellectually; to assist their members and their families in time of need; to aid and assist the aged members of the said lodges, and their wives; to encourage and educate their members in patriotism and obedience to the laws of the country in which such lodges or other units exist, and to encourage tolerance of every kind; to render particular service to orphaned or dependent children by the operation of one or more vocational, educational institutions of the type and character of the institution called "Mooseheart," and located at Mooseheart, in the State of Illinois; to serve aged members and their wives in a special and unusual way at one or more institutions of the character and type of the place called "Moosehaven," located at Orange Park, in the State of Florida; to create and maintain foundations, endowment funds, or trust funds, for the purpose of aiding and assisting in carrying on the charitable and philanthropic enterprises heretofore mentioned; provided, however, that the corporation may act as trustee in the administration of such trust funds, with authority to use the interest therefrom and, in cases of emergency, the principal as well, for the perpetuation of Mooseheart and Moosehaven or either of them.'"

[The Constitution of the Supreme Lodge of the World, Loyal Order of Moose, in its entirety, as amended in 1967 and in force at the time of the incident in question, is separately bound in Appendix G.]

"'The membership of the lodges shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being. . . .'[3] The lodges accordingly maintain a policy and practice of restricting membership to the Caucasian race and permitting members to bring only Caucasian guests on lodge premises, particularly to the dining room and bar.[4]

"On Sunday, December 29, 1968, a Caucasian member in good standing brought plaintiff, a Negro, to the Lodge's dining room and bar as his guest and requested service of food and beverages. The Lodge through its employees refused service to plaintiff solely because he is a Negro.

"Plaintiff complained of the refusal of service to the Pennsylvania Human Relations Commission, which upheld his complaint. The Commission held that the dining room was a 'place of public accommodation,' within the definition of the Pennsylvania Human Relations Act of February 28, 1961, P.L. 47,[5] and that the local Lodge had been guilty of discrimination against defendant. On appeal by the local Lodge the Court of Common Pleas of Dauphin County reversed the Commission and held that the dining room was not a

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"[3] Section 71-1."

"[4] Section 92.2 of the Constitution of the Supreme Lodge permits members to invite non-members, apparently without limitation, to social clubs maintained by a lodge. Under § 92.6 only a member may make any purchase."

"[5] 43 Purdon's Pa. Stat. Annot. §§ 951 et seq."

place of public accommodation within the meaning of the Act.[6]

"In the meanwhile plaintiff brought this action in the District Court for the Middle Section of Pennsylvania, and this three-judge court was constituted under 28 U.S.C. § 2281 to determine whether the issuance or renewal by the Pennsylvania Liquor Control Board under the Pennsylvania Liquor Code of a club liquor license to the local Lodge despite its discrimination against Negroes violates the Equal Protection Clause of the Fourteenth Amendment."

### B. The Holding Below

The court below first considered whether the admitted discrimination on the part of the appellant Lodge "bore the attributes of state action" (*infra*, p. A4). While admitting that "This case presents a situation which is one of first impression" (*ibid.*), the court concluded that (*infra*, p. A5)—

> "We believe the decisive factor is the uniqueness and the all-pervasiveness of the regulation by the Commonwealth of Pennsylvania of the dispensing of liquor under licenses granted by the state. The regulation inherent in the grant of a state liquor license is so different in nature and extent from the ordinary licenses issued by the state that it is different in quality."

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"[6] Pennsylvania Human Relations Commission v. The Loyal Order of Moose, Lodge No. 107, — Pa. D. & C. 2d — (C.P. Dauphin County, March 6, 1970."

[Actually, this decision is reported in the Dauphin County Reports at 92 Dauph. 234. It has been appealed to the Pennsylvania Superior Court.]

After summarizing the extent of the restrictions imposed by the State in regulating the liquor traffic, and stating (*infra*, p. A8) that "It would be difficult to find a more pervasive interaction of state authority with personal conduct," the court said (*infra*, pp. A8-A9; footnotes omitted):

> "In addition to this, the regulations of the Liquor Control Board adopted pursuant to the statute affirmatively require that 'every club licensee shall adhere to all the provisions of its constitution and by-laws.' As applied to the present case this regulation requires the local Lodge to adhere to the constitution of the Supreme Lodge and, thus to exclude non-Caucasians from membership in its licensed club. The state therefore has been far from neutral. It has declared that the local Lodge must adhere to the discriminatory provision under penalty of loss of its license. It would be difficult in any event to consider the state neutral in an area which is so permeated with state regulation and control, but any vestige of neutrality disappears when the state's regulation specifically exacts compliance by the licensee with an approved provision for discrimination, especially where the exaction holds the threat of loss of the license."

Accordingly, on the asserted authority of *Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715, 725, and of *Shelley* v. *Kraemer*, 334 U.S. 1, the court concluded that the state had practiced discrimination (*infra*, p. A11):

> "There is no question here of interference with the right of members of the Moose Lodge to associate among themselves in harmony with their private predilections. The state, however, may not confer upon them in doing so the authority which

it enjoys under its police power to engage in the sale or distribution of intoxicating liquors, under a grant from the state which is conditioned in this case on the club's adherence to the requirement of its constitution and customs that it must practice discrimination and refuse membership or service because of race."

But, while holding racial discrimination to be unconstitutional, the court approved religious discrimination by private clubs, saying (*infra*, p. A11)

"Nothing in what we here say implies a judgment on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin. Such cases are not the same as the present one where discrimination is practiced solely on racial grounds and therefore collides head-on against the 'clear and central purpose of the Fourteenth Amendment . . . to eliminate all official state sources of invidious racial discrimination in the States.' *Loving* v. *Virginia*, 388 U.S. 1, 10 (1967); and cases there cited."

Accordingly, the court held (*ibid.*) "that the club license granted by the Liquor Control Board of the Commonwealth of Pennsylvania to the Moose, Lodge No. 107 is invalid because it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution."

### C. Final Decree; Appeal

The decree entered on this opinion (Appendix B, *infra*, pp. A12-A13), (1) declared the liquor license invalid; (2) directed the Pennsylvania Liquor Control Board and its members to terminate the same; and (3) enjoined the Board and its members "from issuing

any club liquor license to defendant Moose Lodge No. 107 as long as it follows a policy of racial discrimination in its membership or operating policies or practices."

A motion to modify the foregoing by substituting the words "social club" for the word "membership," filed on December 3, 1970, was denied on January 5, 1971 (Appendix C, *infra*, p. A14). But a motion to stay the decree pending appeal to this Court was granted on January 8, 1971.

Meanwhile, on January 4, 1971, Moose Lodge No. 107 had filed its notice of appeal (Appendix D, *infra*, p. A15), joining the non-appealing members of the Liquor Control Board as appellees pursuant to this Court's Rule 10(4).

## THE QUESTIONS ARE SUBSTANTIAL

In pursuit of the objective of striking at particular forms of discrimination wherever encountered, the court below has not only rewritten the Equal Protection Clause to reach purely private action, it has actually done irreparable damage to the constitutionally protected rights of privacy and of private association, while drawing in the process a wholly unsupportable distinction between racial and religious discrimination.

Moreover, the decision below disregards without even the compliment of mention not only the scope of discrimination declared by the Congress, which assuredly rejects the racial versus religious distinction newly fashioned in the opinion below, but also the Congressional exemption for bona fide private clubs, which gives effect to the constitutional rights of privacy and association.

A ruling so disruptive of normal traditional and social relationships imperatively calls for corrective review by this Court.

*First.* The only basis for "state action" in this case is that the appellant Moose Lodge No. 107, admittedly a bona fide private club, has been issued a liquor license by the Commonwealth of Pennsylvania.

That has not hitherto constituted state action under any decision cited in the opinion or of which we are independently aware. Many activities in today's complex and crowded world require licenses before they can lawfully be undertaken, but that circumstance has never before transformed private into state action. Every individual building his own house, or driving a car, or practicing law, requires a license. But the home-owner has absolute liberty to exclude, so does the private automobilist, and a lawyer in America has always enjoyed complete freedom to refuse to represent particular clients on any ground whatsoever, good or bad, praiseworthy or otherwise.

The degree of regulation implicit in a license has not up to now been deemed to metamorphose the action of the licensed individual into that of the licensing state. Nor are we dealing here with situations where the private individual is engaged in activity on publicly owned property (*Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715; *Turner* v. *City of Memphis*, 369 U.S. 350; *Wimbish* v. *Pinellas County*, 342 F. 2d 804 (C.A. 5)), or where he relies on public assistance in the conduct of his affairs, whether of the police (e.g., *Peterson* v. *Greenville*, 373 U.S. 244; *Lombard* v. *Louisiana*, 373 U.S. 267; *Robinson* v. *Florida*, 378 U.S. 153) or of the courts (*Shelley* v. *Kraemer*, 334 U.S. 1), or where he

is in receipt of public funds (e.g., *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (C.A. 4); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4), certiorari denied, 376 U.S. 938; cf. *Smith* v. *Holiday Inns of America*, 336 F. 2d 630 (C.A. 6)).

The test of "all-pervasiveness" suggested by the court below as the hallmark of state action where regulation and licensing is in question (*infra*, p. A5; quoted above at p. 7) is actually no test at all. When is a scheme of regulation pervasive or all-pervasive? At what point does regulation or licensing by the state reach the point where the person licensed falls under constitutional restrictions directed only at the licensing authority? And how can the degree of regulation have the effect of turning the regulated individual into a public officer or agent? A similar contention, to the effect that a state's regulation of and grants of exemption to newspapers so far made them arms of the state as to forbid their rejection of editorial advertisements, was recently—and rightly—rejected by the Seventh Circuit. *Chicago Joint Board* v. *Chicago Tribune Co.*, C.A. 7, No. 18300, decided December 17, 1970 (abstracted at 39 U.S. Law Week 2360).

The substance of the matter is that the grant of a license to operate no more turns that operation into state action than the grant by a state of tax exemption to a religious body involves state establishment of religion (*Walz* v. *Tax Commission*, 397 U.S. 664)—or than the "pervasive" licensing by Pennsylvania under its Solicitation of Charitable Funds Act (of August 9, 1963, P.L. 628, 10 Purdon's Pa. Stat. Annot. §§ 160-1 *et seq.*) of those who solicit money for churches transforms that measure into state support of religion.

As the court below truly said (*infra*, p. A4), "This case presents a situation which is one of first impression,"—and it is such a case because its holding and reasoning wholly lack support in the authorities. After all, the Equal Protection Clause provides—and here as elsewhere in constitutional interpretation it is well to start with the text (Appendix E, *infra*, p. A16)—the Equal Protection Clause provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Constitution says "No State," not "No club," and not "No group of private individuals."

*Second*. In 1963, President Kennedy called on the Congress to implement the 14th Amendment, with reference *inter alia* to equal accommodations in facilities open to the general public (H.R. Doc. 124, 88th Cong., 1st sess., pp. 3-5, 6), and Congress did so in the Civil Rights Act of 1964 (Pub. L. 88-352, 78 Stat. 241).

We pause to note the support given by this Court to Congressional determinations in the civil rights enforcement area. *South Carolina* v. *Katzenbach*, 383 U.S. 301; *Allen* v. *State Board of Elections*, 393 U.S. 544; *Katzenbach* v. *Morgan*, 384 U.S. 641; *Cardona* v. *Power*, 384 U.S. 672; *Gaston County* v. *United States*, 395 U.S. 285; *Perkins* v. *Matthews*, No. 46, January 14, 1971; cf. *Oregon* v. *Mitchell* and related cases, Nos. 43, 44, 46, 47, Orig., December 21, 1970—and we cite Fourteenth and Fifteenth Amendment cases interchangeably because of the identity of the enforcement provisions, Section 5 of the former and Section 2 of the latter.

The Congressional standard for equal treatment, set forth no less than ten times in four titles of the measure just mentioned, the Civil Rights Act of 1964, forbids

discrimination on four stated grounds: "race, color, religion or national origin."[1]

"Sex," was named in Title VII, Equal Employment Opportunity, as an additional area of forbidden discrimination (eight subdivisions of § 703 and in § 704(b)(2); 42 U.S.C. §§ 2000e-2, 2000e-3(b)), while "religion" as an improper differentiation was omitted in Sections 601, 703(e), and 801 (42 U.S.C. §§ 2000d, 2000e-2(e), 2000f), the latter adding "political party affiliation" as a prohibited inquiry. The absence of "religion" in Sections 601 and 703(e) of course reflected only the parochial school and sectarian college problem; cf. *Flast* v. *Cohen*, 392 U.S. 83; *Board of Education* v. *Allen*, 392 U.S. 236; *Pierce* v. *Society of Sisters*, 268 U.S. 510.

Yet the court below, without once speaking of or even intimating reliance on the differentiation for sectarian education, found a distinction between racial and religious discrimination in a wholly secular fraternal body, striking down the first but supporting the second. Poise is likely to be lost in contemplating a result so obviously grotesque.[2]

*Third.* The court below disregarded Congressionally established boundaries in still another aspect, the

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[1] Sections 201(a), 202, 301(a), 401(b), 402, 407(a)(2), 410, and 504(a) (amending three subdivisions of § 104(a) of the Civil Rights Act of 1957); 42 U.S.C. §§ 2000a(a), 2000a-1, 2000b(a), 2000c(b), 2000c-1 [listed but not codified], 2000c-6(a)(2), 2000e-9, 1975c(a)(1)-(3).

[2] Under the ruling sought to be reviewed, every private club desirous of retaining its liquor license will be well advised to employ sophisticated, not to say learned, bartenders; a black guest who has embraced Judaism (e.g., Sammy Davis, Jr., the well known television personality) may not be denied service on the ground of being a Negro—but he may be turned down with impunity provided refusal is rested on the fact that he is a Jew.

exemption for private clubs in Section 201(e) of the Civil Rights Act of 1964 (*infra*, p. A16):

> "The provisions of this title [Title II, Injunctive Relief against Discrimination in Places of Public Accommodation] shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b)."

That exemption, which was in the bill as introduced, and which was continued in every draft up to and including the enactment as ultimately enrolled,[3] gives effect to countervailing constitutional rights, the rights to privacy and to freedom of association.

As expressed by three members of the Court in *Bell* v. *Maryland*, 378 U.S. 226, 313 (footnote omitted),

> "* * * the Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights. Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."

See also *Evans* v. *Newton*, 382 U.S. 296 at 298, where the same rights are recognized.

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[3] H.R. 7152 as introduced, § 202(b); H.R. 7152 as reported to the House on November 20, 1963, § 201(e). Neither the substance nor the numbering of the private club exemption was further changed.

The right of association fails only in respect of activities conducted for profit, or that are open to the public generally. See H.R. Doc. 124, 88th Cong., 1st sess., pp. 3-5; H.R. Rep. 914, 88th Cong., 1st sess., p. 21 (§ 201(e)); *id.*, Part 2, p. 9.

In the present case the status of appellant Moose Lodge No. 107 as a bona fide private club has never been questioned by any party at any time, much less by the court below.

There is here no question of Moose Lodge No. 107 being open to all comers following public solicitation of patronage, as in *Daniel* v. *Paul*, 395 U.S. 298, nor of a transparent subterfuge labeling as private what in actual fact is plainly public (e.g., *United States* v. *Richberg*, 398 F.2d 523 (C.A. 5)), nor of an organization whose membership is in every realistic sense non-restrictive and therefore not truly private (e.g., *Stout* v. *YMCA*, 404 F.2d 687 (C.A. 5); *Nesmith* v. *YMCA*, 397 F.2d 96 (C.A. 4)), nor of a situation where the apparently private club is actually a commercial venture (*Bell* v. *Kenwood Golf & Country Club*, 312 F. Supp. 753, 758, 759 (D. Md.)).

Here, quite to the contrary, Moose Lodge No. 107 is, in law and in fact both, a bona fide private club in every conceivable respect.

*Fourth.* The least untenable ground taken in the opinion below, at least superficially, is that enforcement of the Board's Regulation 113.09 (Appendix F at p. 148), which affirmatively requires that "Every club licensee shall adhere to all the provisions of its Constitution and By-laws," when read together with the Supreme Lodge's exclusion of non-Caucasian members, amounts to state action that fosters and indeed

directs discrimination (*infra*, pp. A8-A9, quoted above at p. 8).

Closer examination of Pennsylvania's liquor laws, however, shows that the Commonwealth's purpose is wholly different.

The Pennsylvania Liquor Control Board's Regulation 113 (Clubs: Records Required; Catering; Appendix F at pp. 147-149) has a double background.

First, Pennsylvania permits sales of liquor by private clubs at times and on days when such sales cannot be made by commercial dispensers. See Sections 406(a), 492(5), and 492(7); Appendix F at pp. 25-26, 67, and 68.

Second, unless private clubs are required strictly to enforce their constitutions and by-laws, subterfuges are inevitable, and places of public accommodation will masquerade as clubs while in fact having no membership requirements whatever (E.g., *United States* v. *Richberg*, 398 F.2d 523 (C.A. 5); *United States* v. *Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La); *United States* v. *Jordan*, 302 F. Supp. 370 (E.D. La.)), thus permitting evasion of closing hour requirements.

Consequently, fairly construed, the regulation seized on by the court below as a touchstone of state action is in reality only an appropriate means of enforcing Pennsylvania's differentiation between places of public accommodation and bona fide clubs. And, in addition, it qualifies as a well-adapted means of enforcing the "not in fact open to the public" distinction in the private club exemption contained in § 201(e) of the Civil Rights Act of 1964 (*infra*, Appendix E, p. A16).

But even assuming that the regulation in question is to be read literally in disregard of its obvious objective,

and that it is held to involve state action, the result reached below is still wrong; on either of two additional grounds.

First, the regulation can and in our view should be regarded as giving effect to the constitutionally protected rights of privacy and of association that are exemplified by the existence and operation of every private club.

Or, second, and this is perhaps a more simple solution in the sense of not requiring any balancing of competing interests, the decree can and should be fashioned so as to enjoin enforcement of that particular regulation insofar as it purports to implement discriminatory qualifications for membership. Then the state is not even arguably in the position of supporting any restrictive membership provision of any kind in even the most private of private associations.

*Fifth.* The right of association is a broad one, not narrowly limited to meeting with one's fellows on the street, or simply to withholding membership lists from public scrutiny. It is "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses." *Evans* v. *Newton,* 382 U.S. 296, 298.

A club, necessarily, encompasses facilities for food and drink, else it would be but a barren barracks. A club bar, accordingly, is a social nexus—but it is more: As a realistic matter it is the bar that offsets the invariable restaurant deficit, and that makes possible virtually every club's continued existence. Consequently to deny a club a liquor license is to doom that club to die.

It follows that the ruling appealed from effectively destroys the great majority of private social clubs in this country.

## CONCLUSION

The decision below rests on grounds that cannot be supported, and the questions presented are substantial. This Court should therefore take jurisdiction of the present appeal.

Respectfully submitted.

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